Supreme Court, U.S.
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No. 91-7580

In The

Supreme Court of the United States

October Term, 1992

GARY GRAHAM,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED

A seventeen-year-old capital defendant introduced mitigating evidence of his youth, acts of kindness, religious observance, redeeming character traits, and troubled family background. The sentencing jury was permitted by statute to answer only three questions:

> whether he acted "deliberately" in committing the offense,
>
> whether he might be dangerous in the future, and
>
> whether he acted unreasonably in response to any provocation by the deceased.

The jury was afforded no other vehicle for considering his mitigating evidence. Does this sentencing procedure satisfy the Eighth and Fourteenth Amendments?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I.

RESPONDENT CAN NOT EXPLAIN HOW MR. GRAHAM'S MITIGATING EVIDENCE COULD HAVE BEEN FULLY CONSIDERED BY THE JURY THAT SENTENCED HIM TO DEATH 2

A. Respondent Misreads *Penry* and Distorts The Core Eighth Amendment Principles Upon Which *Penry* Was Based 2

B. As In *Penry,* Mr. Graham's Mitigating Evidence Was Relevant To An Assessment Of His Personal Moral Culpability Beyond The Scope Of The Texas Special Issues 3

II.

RESPONDENT'S JUSTIFICATIONS FOR THE PRECLUSION OF MR. GRAHAM'S MITIGATING EVIDENCE ARE INSUPPORTABLE AND CONTRARY TO THE CORE EIGHTH AMENDMENT REQUIREMENT OF INDIVIDUALIZED SENTENCING IN CAPITAL CASES 10

A. The Cases Relied Upon By Respondent Do Not Support The Restrictions On Jurors' Consideration Of Mitigating Evidence That It Seeks To Impose Against Mr. Graham ... 11

TABLE OF CONTENTS – Continued

Page

B. Respondent's Attempt To Preclude Mr. Graham's Mitigating Evidence by Interposing A "Nexus" Test Finds No Support In This Court's Eighth Amendment Jurisprudence 13

C. Respondent Fails To Acknowledge The Significance Of Texas' Actions to Correct The Manifest Problem Identified In *Penry* 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Blystone v. Pennsylvania, 494 U.S. 299 (1990) 11, 12, 13, 18

Boyde v. California, 494 U.S. 370 (1990)....11, 12, 13, 17, 18

California v. Brown, 479 U.S. 538 (1987).....8, 16

Eddings v. Oklahoma, 455 U.S. 104 (1982) 4, 8, 12, 13, 16

Hitchcock v. Dugger, 481 U.S. 393 (1987) 15

Jurek v. Texas, 428 U.S. 262 (1976).....11, 12, 13, 14, 18

Lockett v. Ohio, 438 U.S. 586 (1978).....12, 13, 16

McCleskey v. Kemp, 481 U.S. 279 (1987).....12, 15

Payne v. Tennessee, ___ U.S. ___, 111 S. Ct. 2597 (1991) 16

Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51 (1937) 15

Penry v. Lynaugh, 492 U.S. 302 (1989)..... *passim*

Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) 14

Saffle v. Parks, 494 U.S. 484 (1990)..... 11, 12, 13, 18

Skipper v. South Carolina, 476 U.S. 1 (1986) 16

Sumner v. Shuman, 483 U.S. 66 (1987) 15

Williams v. New York, 337 U.S. 241 (1949)..... 15

Woodson v. North Carolina, 428 U.S. 280 (1976) 8, 13, 14, 15

STATUTES

Tex. Code Crim. Proc., art. 37.071.....18, 19

SUMMARY OF ARGUMENT

Although conceding the underlying Eighth Amendment requirement that Mr. Graham's jury remain free to fully consider and give effect to all aspects of his mitigating evidence,[1] Respondent ignores that principle when applying *Penry v. Lynaugh*, 492 U.S. 302 (1989), to Mr. Graham's claim. To support its departure from settled law, Respondent mischaracterizes this Court's Eighth Amendment jurisprudence. Finally, although Respondent assisted the Texas legislature in that branch's honest attempt to achieve the fairness mandated by the Constitution and manifest in other states' statutes, it now denigrates that endeavor. Instead, Respondent supports an outdated statute that has already been shown to prevent jurors in cases like Mr. Graham's from exercising their reasoned moral response to punishment evidence.

These actions demonstrate that Respondent stands alone – against other branches of government, against precedent, against common sense, and against the Constitution – in its attempt to preclude Mr. Graham's jury from considering his compelling mitigating evidence of youth, troubled and chaotic upbringing, religious devotion, good deeds, and positive character traits in determining whether he should live or die.

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[1] Respondent recognizes that a constitutional death penalty statute must "allow the sentencer to consider *'as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " Respondent's Brief (hereinafter R.B.) at 14 (citation omitted) (emphasis in original). See also R.B. at 21.

ARGUMENT

I.

RESPONDENT CAN NOT EXPLAIN NOW MR. GRAHAM'S MITIGATING EVIDENCE COULD HAVE BEEN FULLY CONSIDERED BY THE JURY THAT SENTENCED HIM TO DEATH

A. Respondent Misreads *Penry* and Distorts The Core Eighth Amendment Principles Upon Which *Penry* Was Based.

Penry's factual basis was simple; accordingly, this Court's analysis was straightforward. The three special issues presented to the jury did not provide a vehicle for considering fully Penry's evidence of mental retardation and abused childhood as it "b[ore] on his personal culpability," and no additional instructions were given to ensure that the sentencing decision reflected a "reasoned moral response" to Penry's mitigating evidence. *Penry v. Lynaugh*, 492 U.S. 302, 322-324 (1989). The Court concluded that this violated the constitutional mandate "that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 319. Faithful adherence to this Eighth Amendment tenet and a straightforward application of *Penry* compel the conclusion that Mr. Graham's jury was unconstitutionally precluded from expressing its reasoned moral response to his evidence of youth, troubled family background, and the redeeming aspects of his character.

Despite endorsing this bedrock Eighth Amendment principle as articulated in *Penry*, Respondent argues that *Penry* applies only when a defendant offers evidence of a mental condition which is both permanent and without any mitigating relevance to the special issue regarding future dangerousness. R.B. at 13. This distortion of *Penry* can be explained only as an attempt to uphold Mr. Graham's death sentence.

Mr. Graham has fully described the preclusive effect of the Texas sentencing statute, as applied to his mitigating evidence. Petitioner's Brief (hereinafter P.B.) at 21-39. Even in the face of this extensive demonstration, Respondent repeatedly complains that "Graham neither identified the relevance of his mitigating evidence outside the scope of the special issues nor suggested what instructions might be given to cure the defect he believes to exist." R.B. at 13. See also R.B. at 28, 29. Respondent hopes, no doubt, that repetition will improve the sound of its argument. To still the echo of this refrain, Mr. Graham will revisit the unconstitutional inadequacy of the former Texas special issues as applied to the unique and compelling evidence of his background and character.

B. As In *Penry*, Mr. Graham's Mitigating Evidence Was Relevant To An Assessment Of His Personal Moral Culpability Beyond The Scope Of The Texas Special Issues.

Gary Graham was 17 years old at the time of the offense and possessed all the qualities of his young age. He was nearing the end of adolescence but was clearly not yet an adult. Because of his youth, Mr. Graham possessed the very qualities that people consider instinctively when they think of teenagers: he was immature, impetuous, impulsive, and lacked judgment. As a teenager, he had none of the experience that comes with age and maturity – experience which enables people to appreciate the consequences of their actions and to consider the options and opportunities of the future.

In addition to those qualities common to youth, Gary Graham suffered extraordinary infirmities. Gary Graham never had the benefits of a stable home or the consistent nurturing and guidance of loving parents which are so critical to a child's development. He was virtually abandoned as a child by his mother who was hospitalized between twenty and thirty times for treatment of her

relentless mental illness. As a consequence, he was shuffled from one relative's home to another. Not only was young Gary deprived of the guidance and nurture of his mother, he was haunted by the disturbing image of her in trouble and suffering from the pain of her mental illness.

Despite his difficult childhood history, Gary Graham also possessed redeeming qualities. He helped his parents and grandparents with household chores, and worked with his father. Although himself little more than a child, he had children of his own, and the money he made from work was spent on them. He not only received his grandparents' love, he had earned it and repaid it in kind. He was a religious young man who regularly attended church with his grandmother. These positive qualities also readily could be understood by all jurors without elaboration. They demonstrated to the jury that although Gary Graham over a nine day period had lashed out in very violent ways, he possessed positive qualities and was struggling to meet his responsibilities to those who loved, cared for and depended on him. They demonstrated that this troubled young man nevertheless had redeeming value as a human being.

The composite of all his mitigating evidence, not parsed out into neat yet inadequate categories, showed the jury an adolescent moving toward adulthood, burdened by his past and his youth, yet possessing innocence and faith. This evidence was certainly powerful enough to convince his jurors that Mr. Graham was less morally culpable for his criminal acts than other defendants. *Penry*, 492 U.S. at 322.[2]

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[2] The jury could infer from his composite evidence of youth and troubled childhood that Gary did not have the tools of an adult or of most seventeen year olds to cope with his world or to assume adult responsibilities. As this Court observed in *Eddings v. Oklahoma*:

> [Youth] is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults . . . [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, *so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing*.

455 U.S. 104, 115-116 (1982) (citation omitted) (emphasis added). The Court in *Eddings* also observed that "youth crime as such is not exclusively the offender's fault; offenses by the young also represent the failure of family, school, and the social system, which share responsibility for the development of America's youth." *Id.* at 115 n.11.

The ability of Mr. Graham's jury to fully consider and give effect to evidence of his youth, impoverished childhood, and redeeming qualities was critical to a proper assessment of his personal moral culpability. However, Mr. Graham's jury was precluded from doing so. The jurors who heard this information were not instructed to consider Mr. Graham's personal moral culpability for the crime and were not allowed to express a reasoned moral response to his evidence. Instead, they were limited to the inquiries posed by the same three special issues addressed by this Court in *Penry*.

Respondent's version of *Penry* ignores the constitutional principles underlying that decision, and distorts this Court's language and rationale. *Penry* recognized two constitutional problems with the former Texas special issue structure. First, the special issues, in some circumstances, turned what should properly be considered as mitigating evidence into an aggravating circumstance. The "two-edged" quality of the former special issue structure thus precluded not the consideration of evidence, but the consideration of the mitigating value of that evidence. *See Penry*, 492 U.S. at 324.

Second, and equally important, was the manner in which the special issue questions operated unconstitutionally to preclude the full mitigating value of evidence presented. This Court acknowledged that the special issues might allow for the consideration of some mitigating aspects of a defendant's evidence. However, the narrow scope of the former special issue inquiry precluded jurors from considering mitigating evidence as it bore directly on an individual's reduced moral culpability. *Id.* at 323.

This analysis applies to each of the former special issues. Just as "[p]ersonal culpability is not solely a function of the defendant's capacity to act 'deliberately,' " *id.* at 322, so too is it not solely a function of a defendant's undefined propensity for future criminal acts, nor of the victim's actions. See P.B. at 38. Respondent ignores completely this important aspect of *Penry* in an attempt to deny the constitutional error manifest in this case.

In Mr. Graham's case, the jury was precluded by the operation of the former Texas special issues in both constitutionally impermissible ways. The first special issue limited the jury to an inquiry concerning the deliberateness of Mr. Graham's actions. As with Penry's mental retardation and child abuse, Mr. Graham's evidence of youth, troubled childhood and redeeming qualities was relevant to his personal culpability beyond the jury's inquiry into deliberateness. As in *Penry*, although Mr. Graham's evidence of youth and troubled childhood may have had some bearing on his ability to act deliberately, it also had relevance to his moral culpability – his deathworthiness – beyond the scope of that inquiry. *Id.* at 322.

Likewise, as in *Penry*, the former second special issue prevented Mr. Graham's jury from expressing its reasoned moral response to his mitigating evidence as it related to his personal culpability. An inquiry regarding future dangerousness is distinct from an inquiry into

personal moral culpability. As with deliberateness, an assessment of personal moral culpability does not necessarily correlate with a prediction of future behavior. Personal moral culpability, or blameworthiness, encompasses more than a determination of criminal guilt or the unquantified determination of future dangerousness. *Id.* at 324. A proper assessment of Gary Graham's personal moral culpability required his jury to consider all aspects of his background and character and the circumstances of the offense to determine whether, in light of his youth and troubled background and his redeeming qualities, he was deserving of death or life. Although Mr. Graham's jury could have concluded that his evidence of youth, troubled background, and redeeming character traits may have been relevant to the inquiry of future dangerousness, it still might well have concluded that this same evidence, as it related to his complete personal moral culpability, suggested a sentence of life.

Also, as described in Petitioner's opening brief, Mr. Graham's evidence of youth and his troubled childhood were potentially double-edged with respect to the second special issue in the same way as Penry's evidence of mental retardation. P.B. at 30. In *Penry* this Court concluded that because "one effect of [Penry's] retardation [was] his inability to learn from his mistakes," evidence of mental retardation could be an aggravating factor under the jury's inquiry into future dangerousness. 492 U.S. at 323. In the same manner, the jury could have concluded that Mr. Graham's mitigating evidence increased rather than decreased the possibility that he would pose a future danger. First, as argued by the prosecutor, because Mr. Graham engaged in violent behavior at 17 years, he was more likely than other, older people to continue behaving violently. Second, the jury could have concluded that Mr. Graham's violent experiences at such a young age, given his unstable and troubled childhood, made it less likely that, as he aged, he would develop the judgment and self-control of a normal

adult. *See id.* at 323. Third, because of Mr. Graham's youth, his jury was forced to consider a longer period in the "future" in which he might again be violent, than if he were an older defendant. See P.B. at 30-31.

The central leap of faith in Respondent's argument is that, *as a matter of law,* every juror will conclude that the qualities of youth necessarily dissipate and, therefore, that a teenage defendant's personal culpability is perfectly co-extensive with his likely future dangerousness. R.B. at 31-32. This Court's analysis in *Penry* flatly contradicts Respondent's argument by stressing the importance of "full consideration" of evidence that mitigates against the death penalty, as a prerequisite to a constitutional capital sentencing decision:

> Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a " 'reasoned *moral* response to the defendant's background, character and crime.' " *Franklin,* 487 U.S., at ___, 101 L.Ed.2d 155, 108 S.Ct. 2320 (opinion concurring in judgment) (quoting *California v. Brown,* 479 U.S. at 545, 93 L.Ed.2d 934, 107 S.Ct. 837 (concurring opinion)). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson,* 428 U.S., at 305, 49 L.Ed.2d 944, 96 S.Ct. 2978, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.

Penry, 492 U.S. at 328 (emphasis in original). The jury's consideration of the temporary quality of youth does not begin to exhaust youth's mitigating value. *See Eddings,* 455 U.S. at 115-116. As with the inquiry concerning deliberateness, the mere possibility that a jury would give mitigating effect to one aspect of youth, *i.e.,* its transient

nature, under the second special issue cannot satisfy the Eighth Amendment.[3]

With respect to the former third special issue, Mr. Graham's evidence of youth, troubled childhood, religious devotion and positive character qualities was outside the scope of the issue for the same reasons identified in *Penry.* Mr. Graham was convicted of shooting and killing a man during a robbery. There was no evidence of any provocation by the deceased. Thus, a juror who believed that Mr. Graham "lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if she also concluded the [Mr. Graham's] action was not a reasonable response to provocation." *Penry,* 492 U.S. at 328. Mr. Graham's evidence, again like Penry's, was not relevant to the third special issue.

Respondent's application of *Penry* to Mr. Graham's evidence ignores the well settled Eighth Amendment principle which dictated the result in *Penry* in favor of a rule that would allow states to relegate all mitigating evidence to the function of negating an aggravating circumstance. See R.B. at 28.[4] This argument, in effect,

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[3] Respondent implicitly acknowledges that the jury's inquiry into future dangerousness under the second special issue is independent from its consideration of person moral culpability. Respondent points to the jury's determination of guilt and its inquiry into "deliberateness" as the statutory mechanisms which satisfy the Eight Amendment's requirement that the jury consider the defendant's personal culpability. R.B. at 33.

[4] When its argument runs into difficulty because of the trial court's comments to the jurors at *voir dire,* Respondent states: "the statutory terms at issue relate to matters that might support affirmative answers to the special issues, *i.e.* 'aggravating' factors *that have no logical connection to the inquiry as to whether a rational jury could give effect to Graham's 'mitigating' evidence.*" R.B. at 28. This statement in effect concedes Mr. Graham's point: Any rational juror presented with the former Texas sentencing

would eliminate individualized consideration of a defendant's circumstances, and would leave unregulated aggravating circumstances as the only vehicle for capital jurors to express their moral response. Not only would this outcome overturn sixteen years of this Court's Eighth Amendment jurisprudence, it would create manifestly unfair and arbitrary sentencing structures and prevent rationality and reviewability in sentencing. *See Penry*, 492 U.S. at 326-328. This Court need not and should not accept Respondent's invitation.

II.

RESPONDENT'S JUSTIFICATIONS FOR THE PRECLUSION OF MR. GRAHAM'S MITIGATING EVIDENCE ARE INSUPPORTABLE AND CONTRARY TO THE CORE EIGHTH AMENDMENT REQUIREMENT OF INDIVIDUALIZED SENTENCING IN CAPITAL CASES

Respondent, failing to reconcile *Penry* with the denial of relief here, attempts to justify the limitations placed on juror consideration of mitigating evidence in Mr. Graham's case. To that end, Respondent manipulates this Court's holdings until they are unrecognizable, attempting to interpose a "nexus" requirement on mitigating evidence that has no support under the Eighth Amendment. When this line of reasoning fails, Respondent sinks to denigrating the Texas legislature's appropriate response to the constitutional flaw identified in *Penry*.

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scheme must likewise conclude that the special issues, and their specific terms, only "relate to matters that might support affirmative answers to the special issues, *i.e.* 'aggravating factors' " because they function only to focus the jury's attention upon the aggravating "edge" of the evidence presented. Further, if Respondent perceives no logical link between the very terms of the special issues and mitigating evidence, it cannot possibly argue that a jury of laypersons "could give effect to Graham's 'mitigating' evidence." *Id.*

Renouncing the very constitutional principles it professes to support, Respondent stands alone in its defense of the now abandoned scheme that led ineluctably to Mr. Graham's sentence of death.

A. The Cases Relied By Respondent Do Not Support The Restrictions On Jurors' Consideration Of Mitigating Evidence That It Seeks To Impose Against Mr. Graham.

Just as the power of Mr. Graham's argument is illuminated by the operation of the former Texas scheme in light of *Penry*, so too is his contention supported by this Court's analysis of the sentencing factors in other states' death penalty statutes. Respondents relies upon *Saffle v. Parks*, 494 U.S. 484 (1990), *Boyde v. California*, 494 U.S. 370 (1990), and *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), to support its effort to preclude Mr. Graham's mitigating evidence and to characterize Mr. Graham's claim as contrary to *Jurek v. Texas*, 428 U.S. 262 (1976). These cases, honestly read in light of the state statutes they addressed and the application of those statutes to proffered mitigating evidence, do not support Respondent's restrictive view of the Constitution but, rather, support relief for Mr. Graham.

The central theme of each case was that a capital sentencing scheme only satisfies the Eighth Amendment if it does not preclude a sentencer from fully considering mitigating evidence, and provides that sentencer with an adequate vehicle for expressing its reasoned moral response to all the evidence – aggravating and mitigating – presented. *Parks*, *Boyde* and *Blystone* each involved a capital sentencing scheme in which the jurors were specifically instructed to consider all mitigating evidence presented and were empowered to express their reasoned moral response to that evidence in the form of a life sentence. In fact, it was these qualities of the sentencing statutes which led this Court to uphold them against Eighth Amendment attack.

To argue that states may preclude full consideration of the mitigating value of evidence, Respondent relies on surgically extracted language from these cases while ignoring the constitutional principles that were at issue before this Court. Both the California statute at issue in *Boyde* and the Pennsylvania statute analyzed in *Blystone* empowered the jury to fully and independently consider all aspects of mitigating evidence presented. Both statutes also afforded sentencers a specific vehicle for giving effect to their reasoned moral response to evidence in the form of a life sentence. In each instance, this Court held that these statutory requirements satisfied *Penry*, 492 U.S. 302, *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978).

Respondent also clings to *Parks* to justify the preclusion of Mr. Graham's evidence. However, as in *Blystone* and *Boyde*, this Court held that the Eighth Amendment was satisfied in *Parks* because the jury was specifically instructed to consider all mitigating evidence and statutorily allowed to give effect to that evidence. 494 U.S. at 491. The additional instruction of the trial court not to consider sympathy for the defendant did not operate, contrary to Parks' assertion, to limit or exclude the consideration of mitigating evidence. *Id.* at 492. Although, as this Court observed, it is true that "[s]tates are free to structure and shape consideration of mitigating evidence to achieve a more rational and equitable administration of the death penalty," *id.* at 377, states are *not* free to deny a vehicle for the full consideration of mitigating evidence. *Id. See also Penry*, 492 U.S. at 327, *McCleskey v. Kemp*, 481 U.S. 279, 305-306 (1987).

Respondent also attempts to use *Parks*, *Boyde*, and *Blystone* to portray Mr. Graham's claim under *Penry* as conflicting with *Jurek*. R.B. at 29. However, in *Parks*, *Boyde*, and *Blystone* this Court relied on the same governing principle employed in *Jurek*, *Lockett*, *Eddings*, and *Penry*: the Eighth Amendment mandates that states may not restrict sentencers' consideration of mitigating evidence, nor may states prevent jurors from giving effect to their reasoned moral response to that evidence.

Contrary to Respondent's diversionary argument, *Penry* and *Jurek* are fully complementary:

> *Penry* . . . must be understood in terms of the Court's ruling in *Jurek*, and its application in later cases. We did not view *Lockett* and *Eddings* as creating a rule different from that relied upon in *Jurek;* rather, we indicated that *Lockett* and *Eddings* reaffirmed the reasoning in *Jurek* . . . , and confirmed the necessity of its application to Penry's claim.

Parks, 494 U.S. at 492 (citations omitted).[5]

In stark contrast to the statutory schemes addressed in *Parks*, *Boyde*, and *Blystone*, Mr. Graham's jury, as in *Penry*, was instructed only in the bare terms of the former Texas sentencing statute. As in *Penry*, those narrow and preclusive instructions prevented full consideration of his youth, troubled family background, religious devotion and filial duty and denied the jurors any vehicle for giving effect to this relevant evidence that might well have convinced them to decline to impose a sentence of death. *Penry*, 492 U.S. at 328.

B. Respondent's Attempt To Preclude Mr. Graham's Mitigating Evidence by Interposing A "Nexus" Test Finds No Support In This Court's Eighth Amendment Jurisprudence.

Respondent, as demonstrated above, fails to meaningfully distinguish Mr. Graham's claim from *Penry*, and claims

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[5] The Court also recognized:

> *Penry* interpreted *Jurek* as holding the death penalty statute is constitutional so long as it is interpreted by the Texas courts to permit the jury to consider mitigating circumstances proffered by the defendant.

Parks, 494 U.S. at 492. *See also*, *Boyde*, 494 U.S. at 377, *Blystone*, 494 U.S. at 304-305.

This Court's discussions in *Parks*, *Boyde*, and *Blystone* also dispose of Respondent's contention that Mr. Graham asks that *Jurek* be overruled. See R.B. at 13, 29. He asks only what was granted in *Penry*; that the promise of *Jurek* be redeemed, and that the Court reaffirm the authority – from *Woodson* to *Lockett* and *Eddings* – on which *Penry* rests.

to find support for the preclusion of mitigating evidence in this Court's cases. Thus frustrated, Respondent asks this Court to require proof of a "nexus" between mitigating evidence and the crime. Reiterating the argument made and rejected in *Penry*, Respondent without citation to authority states:

> [E]vidence of a defendant's character or background has mitigating relevance to his culpability for the crime only if it reflects a reduced culpability, *i.e.*, that the capital murder is to some degree attributable to those aspects of his character proffered in mitigation of punishment.

R.B. at 18. Respondent further claims that "unless the defendant can demonstrate some connection between the crime and his proffered evidence, he does not show that he is less culpable than any other person." *Id.* at 19.[6]

Respondent's "nexus" argument is controverted by an unbroken line of this Court's authority. The uncontested constitutional object of bifurcated sentencing proceedings in capital cases is the assurance of an individualized sentencing determination. *See Jurek v. Texas*, 428 U.S. 262, 271-272 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 333 (1976). To insure

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[6] Even if a "nexus" requirement existed in this Court's constitutional jurisprudence, the evidence presented by Mr. Graham is clearly relevant to his moral culpability. Mr. Graham's evidence of youth and youthful attributes, of an absent father and a disturbed and absent mother, of successive caretakers during his childhood, and the pressures of supporting children of his own at such a young age could all lead a juror to conclude that he was less morally culpable than defendants who have no such excuse. *See Penry*, 492 U.S. at 322. Further, his remaining mitigating evidence of positive character traits, good deeds, and religious devotion can not be separated from the evidence above as they demonstrated, when considered *in toto*, that Mr. Graham possessed intrinsic worth which made him deserving of a sentence less than death.

that goal, this Court long ago determined that the Constitution "requires consideration of the character and record of the individual offender and the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304.[7] This Court has followed this mandate without exception. *See, e.g., Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987); *McCleskey v. Kemp*, 481 U.S. 279, 305-306 (1987); *Sumner v. Shuman*, 483

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[7] Over fifty years ago, this Court recognized:

> For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.

Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937). *See also, Williams v. New York*, 337 U.S. 241, 247-249 (1949)).

Citing *Williams*, Respondent only credits as valid sentencing concerns "society's interest in retribution, deterrence, and rehabilitation." R.B. at 18. As with much of its Brief, Respondent's selective quotation obscures the fact that the Court in *Williams* actually supported the other relevant sentencing concern – individualized sentencing:

> Highly relevant – if not essential – to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

Williams, 377 U.S. at 247 (footnote omitted). The Court went on to state:

> The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. The whole country has travelled far from the period in which the death sentence was an automatic and commonplace result of convictions. . . .

Id. The sentencing concern of individualized consideration – applauded in *Ashe* and *Williams* and omitted by Respondent – was held to be a constitutional requirement of capital sentencing in *Woodson*.

U.S. 66, 75-76 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597 (1991), is the most recent demonstration that Respondent's "nexus" argument is out of line with this Court's Eighth Amendment cases. *Payne* upheld the State's presentation of "victim impact" testimony, concerning the "specific harm" suffered by the victim of the crime and her survivors, in large part on the premise that "virtually no limits are placed on the relevant mitigating evidence a defendant may introduce concerning his own circumstances." *Id.* at 2607. This Court emphasized that such mitigating evidence "*must* be received" and considered, even if none of the mitigating evidence is related to the circumstances of the crime. *Id.* (emphasis in original); *see also id.* at 2608-2609 (noting that evidence that defendant was "a good son," "extremely polite," and "suffered from a low IQ" was all constitutionally mitigating, despite that "[n]one of this testimony was related to the circumstances of [the] crimes").[8]

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[8] Respondent misstates Justice O'Connor's views on mitigating evidence. Citing *California v. Brown*, 479 U.S. 538 (1987), Respondent alleges that Justice O'Connor regards a defendant's background and character as constitutionally relevant only if "the capital murder is to some degree attributable to those aspects of character proffered in mitigation of punishment." R.B. at 18. One might usefully compare this representation with, for example, Justice O'Connor's opinion in *Gathers*:

> *Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so.* . . . In this case, the sentencing jury heard testimony from [the defendant's] mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. Gathers' sixth grade teacher testified that he was a quiet and affectionate child. . . . *None of this evidence was directly relevant to the events of September 13, 1986, but all of it was relevant to the jury's assessment of the defendant and his moral blameworthiness.*

490 U.S. at 827-838 (O'Connor, J., dissenting on other grounds) (emphasis added).

Even the cases Respondent relies on flatly dispute this novel "nexus" argument. Curiously, Respondent relies on *Boyde v. California*, 494 U.S. 370 (1990), for its claim that mitigating evidence must relate to the specific criminal act. R.B. at 19, 20. In fact, *Boyde* holds exactly the opposite. As discussed above, *Boyde* upheld the California jury instructions precisely because they did not preclude the jury's consideration of mitigating evidence. In particular, this Court noted that the instructions allowed for consideration of evidence that was *not* linked to the commission of the crime:

> Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other factors listed in [the statute] *allow for consideration of mitigating evidence not associated with the crime itself*, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, *and youth*.

Boyde, 494 U.S. at 383 (emphasis added).

Therefore, the constitutionality of the sentencing scheme in *Boyde* was upheld precisely because the Court found that the statute adequately allowed the jury to consider evidence relevant to *moral* culpability and the appropriate desserts beyond the narrow issues of *criminal* culpability and guilt. The import of *Boyde*, supported by the sum of Eighth Amendment death penalty jurisprudence, is that any sentencing scheme which *does* limit the consideration of mitigating evidence solely to criminal culpability for the specific act for which the defendant was found guilty cannot withstand constitutional challenge.

Like its attempt to enlist this Court's cases in its campaign to preclude juror consideration of Mr. Graham's evidence, Respondent's interposition of a "nexus" requirement between mitigating evidence and a capital sentencer cannot bear constitutional scrutiny.

C. Respondent Fails To Acknowledge The Significance Of Texas' Actions to Correct The Manifest Problem Identified In *Penry*.

The actions of the Texas legislature in light of *Penry* belie Respondent's argument for preclusion of mitigating evidence. Respondent denigrates the legislature's legitimate attempts to cure the constitutional defect in the former Texas sentencing scheme and to attain the fairness required by the Eighth Amendment. Respondent's argument not only illustrates how it stands alone in its insistence on limiting mitigating evidence, its position is also disingenuous.[9]

The application of amended Texas Code of Criminal Procedure, art. 37.071 would cure the defect in Mr. Graham's trial while assuring reliability and reviewability of jury sentences in capital cases. P.B. 19-20. The vehicle by which the Texas legislature has chosen to empower jurors in a capital case has much in common with the statutes upheld by this Court – and relied on by Respondent – in *Parks*, *Boyde* and *Blystone*.[10]

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[9] When suiting its purpose, Respondent praises the work of the Texas lawmakers: "The efforts of the Texas Legislature to achieve rationality and evenhandedness in capital sentencing are represented in [*former*] Article 37.071 of the Texas Code of Criminal Procedure, the [facial] constitutionality of which was confirmed in *Jurek v. Texas*, 428 U.S. 262 (1976)." R.B. at 16 (emphasis added). Respondent has no such praise for the legislature's 1991 amendment of the statute.

[10] Contrary to Respondent's assertion, Mr. Graham does not argue that the Constitution commands states to adopt "weighing" statutes. See R.B. at 17. Mr. Graham notes that (1) all the cases on which Respondent relies are ones holding that particular weighing statutes pass constitutional muster, (2) the former Texas statute scheme was found wanting in *Penry*, and (3) in light of this constitutional history, Texas has now chosen a weighing mechanism in its new sentencing statute.

Respondent's belittling of Texas' legislative response to *Penry* rings hollow. Respondent now describes "[t]he amendment [of art. 37.071] upon which Graham relies" as "a legislative overreaction to the concerns the Court voiced in *Penry*." R.B. at 27. This criticism is at best curious, inasmuch as counsel for Respondent was instrumental in drafting the post-*Penry* statute and urged its adoption before the Texas legislature.[11] The Texas legislature not only "believed an amendment was appropriate," R.B. at 27, but, less than a year ago, the executive branch of Texas – that is, Respondent – believed that this particular amendment was appropriate and necessary to deal with mitigating evidence like that presented by Mr. Graham at his trial.

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[11] In fact, Assistant Attorney General Robert Walt – who represented Respondent in all previous federal proceedings in this case, including, until recently, those in this Court – was a chief architect of this legislation. See Testimony of Mr. Robert Walt, Assistant Attorney General for the State of Texas before the Senate Criminal Justice Committee, April 14, 1991, supporting Senate Bill 880 (Amendment to Tex. Code Crim. Proc., art. 37.071 as adopted) (describing his involvement in the drafting of the bill to meet the requirements of *Penry*). See also Testimony of Mr. Rob Kepple, General Counsel for the District Attorney's Association, before the Senate Criminal Justice Committee, April 14, 1991, supporting Senate Bill 880 (Amendment to Tex. Code Crim. Proc., art. 37.071 as adopted) ("Bob Walt and his crew [the people in the Attorney General's Office who handle capital appeals on behalf of the State of Texas] have been working very carefully to make sure that we have something that follows what the Supreme Court tells us we need to do."

CONCLUSION

For all the reasons set out in Mr. Graham's opening brief, and in this Reply, he renews his request that the Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit in his case and remand with directions to grant the writ of *habeas corpus*.

Respectfully submitted,

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